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OCTOBER TERM, 1974

Nos. 74-878 and 74-879

THE NATIONAL LEAGUE OF CITIES, et al.,
Appellants

v.

PETER J. BRENNAN,
SECRETARY OF LABOR

THE STATE OF CALIFORNIA, et al.,
Appellants

v.

PETER J. BRENNAN,
SECRETARY OF LABOR

On Consolidated Appeals From the United States District Court for the District of Columbia

BRIEF FOR APPELLANT STATE OF CALIFORNIA

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On Consolidated Appeals From the United States District Court for the District of Columbia

BRIEF FOR APPELLANT STATE OF CALIFORNIA

Appellant State of California appeals from the Judgment of the United States District Court for the District of Columbia, entered on December 31, 1974, dismissing with prejudice both the Complaint of the National League of Cities, et al., as amended, and the Complaint in Intervention of the State of California.

OPINION BELOW

The Per Curiam Opinion of the United States District Court for the District of Columbia, dated December 31, 1974, is not yet reported. A true and correct copy thereof is set forth in the Appendix (App. 643).

JURISDICTION

The action below was brought pursuant to the provisions of 28 U.S.C. §§ 1331, 1337, 1346, 2201 and 2202, as well as the Fifth, Tenth and Eleventh Amendments to the Constitution of the United States (App. 6).

A three-judge district court was convened pursuant to 28 U.S.C. § 2282. Appellant State of California filed a Notice of Appeal from the adverse Judgment of the court on January 8, 1975 (App. 4).

Jurisdiction of this Court was invoked by appellant State of California in its Jurisdictional Statement pursuant to the provisions of 28 U.S.C. §§ 1253 and 2101(b), providing for direct appeal to the United States Supreme Court from an order of a district court of three judges denying interlocutory or permanent injunctive relief in a civil action or proceeding properly brought under an Act of Congress regulating commerce (28 U.S.C. § 1337).

On January 27, 1975, this Court noted probable jurisdiction and consolidated this appeal (No. 74-879) with that of the National League of Cities (No. 74-878).

QUESTIONS PRESENTED

1. Carefully balancing the respective interests of the federal and state governments, shall blanket coverage of the Fair Labor Standards Act to all state employees find support under the Commerce Clause so as to permit the regulation of indispensible and unique sovereign functions of State government which, unlike those activities presented in *Maryland* v. *Wirtz,* are not in competition with private industry and have no other rational connection with commerce?

2. Notwithstanding section 16 (29 U.S.C. § 216(b)) of the Fair Labor Standards Act, as amended in 1974, shall the sovereign states retain their Article III and Eleventh Amendment immunity from suit by their employees in a federal forum?

STATUTES INVOLVED

The pertinent sections of the Fair Labor Standards Act Amendments of 1974 (Pub. L. 93-259; 88 Stat. 55)[1] are set forth in full as "Exhibit A" hereto. The subject of this appeal is whether said statutes are constitutional as applied to State and local governments under the Commerce Clause (Art. I, § 8, cl. 3), and the Fifth, Tenth, and Eleventh Amendments to the United States Constitution.

[1] The sections referred to above amend or repeal various sections of the Fair Labor Standards Act of 1938 (29 U.S.C. §§201–219). The principal amendments in issue are those which are part of Section 6 of the Fair Labor Standards Act Amendments of 1974 (Pub. L. 93-259) entitled "Federal and State Employees".

STATEMENT OF THE CASE

By a Complaint for Declaratory Judgment, together with an Application for Preliminary Injunction, appellant National League of Cities, et al. filed this action in the United States District for the District of Columbia seeking injunctive and declaratory relief against various provisions (see "Exhibit A" hereto) of the Fair Labor Standards Act Amendments of 1974 which, for the first time in the 36-year history of the Fair Labor Standards Act of 1938, sought to impose federal requirements on the wages, hours, and working conditions of *all* Federal, State, and local government employees (App. 6). A three-judge District Court was duly convened (28 U.S.C. § 2282) (App. 1) and the matter of the preliminary injunction was set for December 30, 1974 (App. 1).

By an Order dated December 26, 1974, the Court granted the Motion of Appellant State of California to intervene as a party plaintiff and to fully participate in the Application for Preliminary Injunction set for December 30, 1974 (App. 2). The Complaint in Intervention of appellant State of California was also filed and served on that date (App. 43); the State's Application for Preliminary Injunction was filed on December 27, 1974 (App. 3).

Defendant Secretary of Labor, Peter J. Brennan, filed on December 27, 1974, a Motion to Dismiss the Complaint, and an Opposition to the Application for Preliminary Injunction (App. 3). The Motion to Dismiss was also set to be heard contemporaneously

with plaintiffs' Application for Preliminary Injunction (App. 3).

On December 30, 1974, the Applications of plaintiffs and plaintiffs-intervenors for a Preliminary Injunction, as well as defendant's Motion to Dismiss, came on regularly for hearing before United States Circuit Judge Harold Leventhal and United States District Judges Oliver Gasch and Barrington Parker. At that time, seventeen additional states were permitted to intervene as plaintiffs with the stipulation that, except as to plaintiff State of California, service of all pleadings on said intervening states would be effective by service on counsel for plaintiff National League of Cities, Mr. Charles Rhyne. Several depositions and affidavits were received into evidence (App. 86, 246, 311, 588, 591, 621, 625, 639) and the matter was argued and submitted for decision.

On December 31, 1974, the three-judge District Court below, in a Per Curiam Opinion, denied the Applications for Preliminary Injunction and dismissed the Complaint, as amended,[2] and the Complaint in Intervention.

Appellants National League of Cities, et al. (and the intervening States) filed their Notice of Appeal

[2] The lower court's Opinion (App. 643) is also addressed to an Amendment to paragraph 39 of the Complaint of plaintiff National League of Cities, which alleges a violation of the Fifth Amendment, United States Constitution, for the failure of appellee Department of Labor to give proper notice of its police and firefighter regulations (29 C.F.R. § 553, *et seq.*) prior to their effective date. The formal regulations pertaining to fire and police personnel were not published in the Federal Register until December 20, 1974, a mere eleven days before their date of implementation, January 1, 1975. A copy of said regulations is appended hereto as "Exhibit B".

on December 31, 1974. The Notice of Appeal of appellant State of California was filed on January 8, 1975 (App. 4).

SUMMARY OF ARGUMENT

The Fair Labor Standards Act Amendments of 1974, which seek to regulate the wages, salaries, and hours of virtually all employees of State government, is a patent denigration of the sovereign and reserved rights of the States to deal with their respective personnel and to conduct their manifest governmental activities. The Amendments touch the very heart of State sovereignty, nullifying numerous State statutes which regulate the wages and hours of State employees performing indispensable sovereign functions. On its face, the statute can be justified only if the Court accepts the bald premise that everyone but supervisory or executive personnel of a State are engaged in interstate commerce.

The 1974 Amendments are therefore inherently "suspect", requiring judicial review in a manner which transcends the usual inquiry of whether a "rational basis" exists for the statute. The government is required to bear the burden of establishing not only that the Amendments are supported by a compelling national interest, but that the application of the Act will not unduly interfere with the State's performance of its crucial public functions.

The 1974 Amendments are predicated in their entirety on this Court's decision in *Maryland* v. *Wirtz,* 392 U.S. 183 (1968). Neither Congress nor the Court will find solace or support in *Wirtz* for the revolu-

tionary policies wrought by the omnibus blanket Amendments of 1974.

The Court must prevent Congress from extrapolating *Wirtz* to unjustifiable extremes. *Wirtz* itself recognizes that Congress may not use a relatively trivial impact on commerce as an excuse for the broad inclusion of all State activities as an "enterprise". Moreover, even assuming Congress could constitutionally define those sovereign functions said to affect commerce, the Act is conspicuously silent as to those specific State activities involving wages, salaries, or hours deemed to affect commerce. The statute fails under recent decisions of this Court which lament the lack of specificity in similar acts, leaving for judicial resolution an unlimited universe of nebulous connections with commerce.

As conceded by the lower court, virtually all of the economic activities of a State are "not in serious competition with private industry." The single factual predicate advanced by the lower court was the substantial purchase of goods and equipment in interstate commerce by State and local governments. However, such governments merely utilize their goods in the performance of essential public services, not for profit, and are therefore "ultimate consumers" traditionally exempt from coverage under the Act.

Section 16(b) (29 U.S.C. § 216(b)) of the Act, which was amended in order to subject the States to jurisdiction in the federal courts in actions by aggrieved employees, remains constitutionally infirm under both Article III and the Eleventh Amendment.

ARGUMENT

I. STRICTLY SCRUTINIZED, APPLICATION OF THE FAIR LABOR STANDARDS ACT TO ALL STATE EMPLOYEES IS NOT SUPPORTED BY A COMPELLING NATIONAL INTEREST. MOREOVER, WHEN THE RESPECTIVE INTERESTS OF THE FEDERAL AND STATE GOVERNMENTS ARE CAREFULLY BALANCED, THE ACT CANNOT BE APPLIED TO THE STATES UNDER THE COMMERCE CLAUSE SO AS TO REGULATE UNIQUE AND CRUCIAL FUNCTIONS OF STATE GOVERNMENT WHICH ARE NOT IN COMPETITION WITH, AND HAVE NO OTHER RATIONAL RELATIONSHIP TO, INTERSTATE COMMERCE.

A. By the 1974 Amendments to the Fair Labor Standards Act, Congress Has Touched the Very Heart of State Sovereignty. The Impact Is Enormous. The State Budget Must Be Restructured and Numerous State Statutes, Which Regulate the Wages, Hours, and Working Conditions of Employees Performing Indispensable Public Services Will Be Nullified.

1. *Background.* Since 1966, employees of State and local schools, colleges, hospitals, and other health care institutions have been subject to the wage-hour provisions of the provisions of the Fair Labor Standards Act of 1938 (52 Stats. 1060; 29 U.S.C. § 201 *et seq.*), as amended. In *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), this Court held that such legislation could be supported as a scheme necessary to protect commerce and to promote labor peace; that labor conditions in schools and hospitals can affect commerce; and that Congress interfered with State functions only to the extent that it subjected the States to the same wage

and overtime limitations as private employers who were engaged in *the same* economic activities.

On April 8, 1974, the President signed Amendments to the Act (Pub. L. 93–913; 88 Stats. 55), effective May 1, 1974, extending the minimum wage and overtime provisions of the Act to *all* Federal, State, and local government employees, except as to those employees who serve in "executive, administrative, or professional" capacities.[3] Fire protection and law enforcement personnel (including correctional personnel) were provided an exemption under section 13(b)(20) of the Act (29 U.S.C. § 213(b)(20)) until January 1, 1975, at which time such personnel were required to be *paid* premium overtime for tours of duty in excess of 240 hours in a work period of 28 days (60 hours for 7 days, or in a ratio of 240/28 for work periods between 7 and 28 days). By the new Amendments, in January of the following two years (1976 and 1977), premium compensation will have to be *paid* for work performed in excess of 232 and 216 hours, respectively, including ratios for premium pay for work performed beyond a 7-day work period. The new Amendments do not require weekly or semimonthly payments; however, minimum wage and overtime will be computed on the basis of hours worked each workweek.[4] Compensatory time off ("C.T.O.")

[3] Other provisions of the Act's Amendments require equal pay for employees of either sex performing substantially the same job; prohibit discrimination in employment to persons between 40 and 65 years of age; and prohibit child labor under certain ages for certain activities.

[4] A "workweek" is a regular recurring period of 168 hours in the form of seven consecutive 24-hour periods. "Hours worked" includes all time an employee is required to be on duty or on

taken in a later pay period does not meet the Act's new overtime provisions.

Section 16(b) (29 U.S.C. § 216(b)) of the Act was also amended so as to allow employees covered by the Act to bring an individual and/or class action in the Federal courts against his State or local employer for injunctive relief, including damages, fees, and costs of suit.

2. *Effect of the Subject Amendments on the State of California.* The Fair Labor Standards Act Amendments of 1974 will severely limit, if not altogether eliminate, the ability of the State of California to recognize the overtime hours of its employees in forms other than cash compensation. Numerous California statutes will be superseded and nullified by the federal amendments. For example, California Government Code sections 18021.5 and 18023 [5] allow the Cali-

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the employer's premises, at a prescribed workplace, and all times during which the employee is suffered or permitted to work. 29 U.S.C. § 207.

[5] California Government Code section 18021.5 provides as follows:

"The State Personnel Board shall provide the extent to which, and establish the method by which, ordered overtime or overtime in times of critical emergency is compensated. The board may provide for cash compensation at a rate not not to exceed 1½ times the regular rate of pay, and the rate may vary within a class depending upon the conditions of work, or the board may provide for compensating time off at a rate not to exceed 1½ hours of time off for each hour of overtime worked. The provisions made under this section shall be based on the practices of private industry and other public employment, the needs of state service, and internal relationships."

Section 18023 provides:

"The granting of compensating time off in lieu of cash compensation is not prohibited where compensating time

fornia State Personnel Board to provide for *either* case compensation *or* C.T.O. at 1½ times the regular rate of pay or hours worked ;C.T.O. may be taken up to a period of *12 months* following the overtime worked. Under the federal amendments, C.T.O. *must* be taken in a *28-day* work period or such personnel must be *paid* premium overtime.

The Federal statute, in one stroke, works to the disadvantage of employer and employee. The effect of the Act on State's fire suppression program is instructive. The extended statewide fire season (of 5 to 8 months' duration) frequently requires a "campaign" fire suppression program to be waged in California's vast mountainous regions. Members of the fire suppression classes in State service receive an additional 15% "fire mission pay" and, by Government Code section 18021.7,[6] may work *84 hours* per week (or *364 hours* per *calendar* month during a declared "fire mission" period) before overtime rules apply. The Department of Conservation, Division of Forestry, permits the taking of *cash* compensation for up to 40 hours earned overtime per year; all remaining earned

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off can be granted within twelve calendar months following the month in which the overtime was worked and without impairing the services rendered by the employing state agency."

[6] California Government Code section 18021.7 provides:

"It is the policy of the state that the normal workweek of permanent employees in fire suppression classes of the Division of Forestry shall not exceed 84 hours a week. Work in excess of the designated normal workweek may be compensated for in cash or compensating time off in accordance with the regulations of the State Personnel Board."

C.T.O. may be taken in the inactive winter months. Many employees utilizing C.T.O. work secondary jobs during these months. If the workweeks during the fire season workweeks are changed to accommodate the Act (as, for example, by assigning firefighting employees to four 12-hour shifts over a four-day period so as to effectuate a 48-hour workweek), the commuting distance to various remote ranger stations in the State would in many instances be too costly and time-consuming to the employee. The current work assignments [7] are satisfactory to California firefighters who desire longer periods with their families at home.[8]

Yet, by the federal amendments, such employees are now restricted to *60 hours* per workweek (or *240 hours* per *28-day* work period) and are precluded from utilizing all C.T.O. which is not taken during a 28-day work period. The wishes of the employer and the employee are lost to the irrational whim of Congress.

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[7] During the *non-fire season*, California firefighters work a 40-hour week, Monday through Friday, 8 hours per day. During the *fire season*, 84 hours are worked per week during a 2-week period as follows: four 24-hour days on, three 24-hour days off, followed by three 24-hour days on and four 24-hour days off. A work assignment of 8 hours per day for 5 consecutive days, which is purportedly the annual experience on the east coast, simply has no application to the untamed wildlands and forests of California during the fire season.

[8] By a Resolution adopted during the Annual Convention of the California Division of Forestry Employees' Association, during December 6–8, 1974, in Eureka, California, said Association in disapproving of the FLSA Amendments stated that "a significant reduction in hours worked could result in a severe curtailment of fire protection services to the public and an undesirable split shift for employees; . . .".

These and other effects of the federal amendments were referred to by the lower court as follows (App. 650):

> "California, for example, has a mutual aid program, through which counties cooperate to provide aid in time of floods and other disasters. The municipalities and counties participate gratuitously, without reimbursement. Counsel for California fear that the overtime pay provisions of the Amendments will prove so burdensome that counties will be unwilling to continue to cooperate in this venture.
>
> "Also, compensatory time-off arrangements which allow for heavy working seasons during the summer, for forest fire fighters, or during the winter, for snow removal personnel, may be prohibited by the provisions requiring overtime payment. California, for example, represents that its forestry service employees are under special arrangements for the 5-8 month forest fire campaign program, which are dependent as a practical matter on a compensatory time off arrangement during the winter months. Salt Lake City fears it may not be able to continue its practice of working its snow removal employees some 7,000 hours in excess of 40 hours per week during the winter with an equal amount of time off during the summer, despite the apparent acceptability of this arrangement to both employer and employees."

The State of California, by its verified Complaint in Intervention below, alleged an estimated *8 to 16 million* dollars by reason of the extension of the Act to State government, as well as an *additional* esti-

mated *6 million dollar loss* in the "Mutual Aid" fire program, *750,000 dollars* in California Highway Patrol Academy training, and an *inestimable* amount in meeting the record-keeping requirements of the Federal Act.[9]

Following promulgation of the Department of Labor's regulations pertaining to fire and police personnel on December 20, 1974 (See "Exhibit B" hereto), the California Department of Conservation, Division of Forestry, made an in-depth study of the fiscal impact of the Act on the State fire suppression program and concluded that the effect on that Department *alone* will exceed *23 million dollars.*[10] Appellant proceeds to a brief, general summary of such costs, followed by more specific examples of the Act's untoward consequences on the California Civil Service system within the Division of Forestry.

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[9] The National League of Cities has estimated the cost to States and Cities nationally to be approximately *200 million dollars.* The Government in its Motion to Dismiss and Opposition to the Application for Preliminary Injunction alleged that the actual fiscal impact of the Federal Amendments on the Nation was but *27 million dollars.* The Government's figure is ludicrous, irrespective of the dollar accuracy of plaintiff's estimate. In any event, the constitutional question presented here—the unprecedented federal regulation of *all* State and local government employees— is of such gravity as to render such a statistical confrontation by the parties immaterial.

[10] *Excluding* the Department of Conservation, the allegations of the Complaint in Intervention (assumed to be true for purposes of the Government's Motion to Dismiss. *Scheuer* v. *Rhodes,* 416 U.S. 232, 236 (1974)) set forth an impact of approximately *10,918,255 dollars* to other State programs. (See App. 74). Augmented by the estimate of the Department of Conservation (23,636,500 dollars) discussed above, the cost to all of California State government programs is *34,554,755 dollars.*

a. Costs to the California Department of Conservation in Each Type of Fire Suppression Program Affected.

(1) CONTRACT COUNTIES

California Public Resources Code, Section 4129, provides that any county may elect by ordinance to assume the responsibility for the prevention and suppression of all fires on all land within the county, including an area of State responsibility. Further, Public Resources Code Section 4142 authorizes the California State Forester, with the approval of the Director of General Services, to enter into cooperative agreements for the purpose of preventing and suppressing fires in any lands within any county, city or district which makes an appropriation for such purpose. Under the provisions of these statutes, the State Forester has contracted with five counties: Kern, Los Angeles, Marin, Santa Barbara and Ventura.

The State Forester is authorized to allocate those funds which the Division would normally have spent in these counties for wildland fire protection to the county directly. The dollar impact on this program by virtue of the Fair Labor Standards Act Amendments of 1974 is---------- $1,680,000

(2) U.S. FOREST SERVICE CONTRACT PROTECTION

The U.S. Forest Service maintains a substantial organization for the protection from fire of wildland resources located in 18 national forests in California. Intermingled with the Federal land is State and privately owned land that has been classified as state responsibility area. Under the authority of Section 4141

of the California Public Resources Code the protection of this state responsibility area is contracted by the State (through the Division of Forestry) to the Forest Service to avoid duplication of forces. The contract provides support for salaries and wages and operating expenses for men and equipment at the level which the Division of Forestry provides to comparable areas within its own protection area. The fiscal impact of the Fair Labor Standards Act on this program is ---------- $750,000

(3) CALIFORNIA DIVISION OF FORESTRY DIRECT PROTECTION

The Division of Forestry directly protects more than 23 million acres of State responsibility area throughout California. In addition to protecting State responsibility area, the Division of Forestry provides wildland fire protection to intermingled federally owned lands throughout California. In total, the Division directly protects about 28 million acres. To fulfill its responsibility, the Division maintains one of the largest fire protection organizations in the nation. The fiscal impact of the Fair Labor Standards Act is:

Permanent personnel -----	$8,350,000
Seasonal Fire Fighters----	3,970,000
Training Programs ------	602,400
Total ----------	$12,922,400

(4) LOCAL GOVERNMENT FIRE PROTECTION PROGRAM

The Division of Forestry provides structural fire protection on a contractual basis to several forms of

local government. The protection provided through these contracts is of local responsibility and is authorized under Section 4142 of the California Public Resources Code. The levels of protection provided, as well as the periods during which the forces are contracted, differ considerably according to local desires. The cost for this program is borne by those local governments involved. While these *local* costs do not affect the *State's* protection budget, they are part of the total fire protection system operated by the Division and give insight into the full impacts of the Fair Labor Standards Act.

The *estimated* cost increase to local government contracting with the Division of Forestry for structural fire protection is ---------- $8,284,100

The *grand total* of the dollar impact on all Division of Forestry protection programs, including local government, is therefore ---------- $23,636,500 [11]

b. Adverse Effects on Civil Service Within the California Division of Forestry Since May 1974.

Currently 4,766 employees of the California Department of Conservation, Division of Forestry, are subject to the provisions of the Fair Labor Standards Act under the 1974 Amendments. Since the implementation of the Act to these employees in May 1974, millions of dollars have been spent for administering the identical public services provided prior to the Amend-

[11] These figures are, by necessity, estimates based on the assumptions of maintaining the same level of protection and converting to a 60-hour workweek.

ments. Various personnel practices within the Department have also been adversely affected. These effects may be summarized as follows:

(1) ADDITIONAL (AND UNNECESSARY) SEASONAL FIREFIGHTERS.

By using the Department of Labor's method for calculating hourly rates, the Department of Conservation has determined that seasonal firefighters were being paid at $1.01 per hour. Their duty week was immediately reduced by one-half to 60 hours, which effectively raised their hourly rate of pay to $2.02. Since the duty week was reduced by 50 percent, it mandated that nearly twice the previous number of firefighters be hired. Hiring the additional seasonal firefighters and adding support personnel cost the Department approximately *5.4 million dollars.*

(2) CALIFORNIA ECOLOGY CORPS—REDUCTION IN MANPOWER AND FACILITIES.

The Department of Conservation noted the same Federal minimum wage violation for Forestry's Ecology Corps personnel.[12] Their hourly rate was 75 cents; however, room and board, insurance and uniforms were supplied as part of their compensation. To comply with the Department of Labor procedures, Ecology Corps employees' hourly rate was raised to $1.90 ($2.00 January 1, 1975) and they were charged for meals and housing. This method had a cost impact of approximately *one million dollars per year.*

[12] The California Ecology Corps is a State effort to provide work for the unemployed, many of whom are veterans.

As a result of the Fair Labor Standards Act, the Division will reduce the number of its Ecology Corps Centers from 8 to 5 and will reduce the manpower complement at one other center from 80 to 60 corpsmen. This will result in 200 less jobs.

(3) LOSS OF ADDITIONAL "FIRE MISSION" PAY.

In early June 1974, the Department of Conservation determined that the following forestry classes appeared not to meet the fire protection exemption in the Fair Labor Standards Act: Forestry Cook I & II, Civil Engineering Technician II, Equipment Maintenance Supervisor, Materials & Stores Supervisor I, Heavy Equipment Mechanic, and Fire Lookout (seasonal). Therefore, these classes were returned to their non-fire mission assignment duty weeks and rate of pay, with the exception of Lookouts, who remained on fire pay. There does not appear to be any appreciable cost increase from this action; however, a substantial number of employees in these classes lost between 5 percent and 15 percent pay for "fire season" work.

(4) SALARY COMPACTION BETWEEN EXEMPT AND COVERED CLASSES UNDER A "PLANNED OVERTIME" PROGRAM.

Fair Labor Standards Act will cause compaction problems between the State Forest Ranger I and II classes (exempt from the Federal Act), and those of the Fire Captain and Fire Crew Supervisor (covered by the Act). To minimize the cost of implementing the Fair Labor Standards Act provisions, the Department of Finance has instructed the Department of Conservation to use "planned overtime" during the 1975 fire season. However, this alternative creates a

severe compaction problem between the Fire Captain, Fire Crew Supervisor *fire suppression classes* and State Forest Ranger I and II *supervisor classes.*

The following two tables clearly illustrate this problem:

	Pre-FLSA	*FLSA*
Fire Captain	$1079–$1311	$1233–$1498 [13]
Fire Crew Supervisor	$1190–$1445	$1360–$1650 [13]
State Forest Ranger I	$1319–$1595	$1319–$1595
State Forest Ranger II	$1445–$1758	$1445–$1758

The first ("Pre-FLSA") column depicts the current salary relation between the four listed classes. Column two ("FLSA") depicts the actual guaranteed monthly salary by using planned overtime under the Fair Labor Standards Act. Fire Captains and Fire Crew Supervisors will be on planned overtime and State Forest Ranger I and II's, exempt from the Fair Labor Standards Act, will continue on their present workweek and salary. Note that the Pre-FLSA salaries do not progress as they do in the column representing the FLSA salary profile. A Fire Captain at maximum ($1498) would be compensated at a higher rate than a State Forest Ranger I at first ($1319) or second step ($1385) in the range. A Fire Crew Supervisor, at a starting salary of $1360 would have a higher salary in all steps than would a Ranger I, and would be compensated higher than a first step ($1445) Ranger II. It will be very difficult for the Ranger class to accept this arrangement for an extended period of time. Accordingly, acceptable salary progressions can be maintained only during non-fire mission assignment.

[13] All salaries rounded to nearest dollar.

B. Judicial Review of the 1974 Amendments Transcends the Usual Inquiry of Whether a Rational Basis Exists for the Act. Rather, Because the Statute is Facially Suspect, the Government Bears the Burden of Establishing That the Federal Regulation of Virtually All State Salaries Is Supported by a Compelling National Interest and, if So Supported, That Such Regulation Will Not Unduly Interfere With the State's Performance of Its Sovereign Functions.

The preceding argument manifestly demonstrates the depth to which Congress has intruded into the very halls of the legislatures of the sovereign States, regulating the mode and method of compensation of their employees which, since 1880, have heretofore been reserved powers of the States. *Newton* v. *Commissioners,* 100 U.S. 548, 559 (1880). Even as early as 1900 this Court held that it is essential to the independence of the States that such powers be exclusive and free from external interference, except as plainly provided to the contrary by the United States Constitution. *Taylor* v. *Beckham,* 178 U.S. 548, 570–571 (1900). More recently, this court has found that a State has a valid interest in preserving the fiscal integrity of its programs, and may legitimately limit its expenditures, whether for public assistance, public education, *or any other purpose. Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969). In the same fashion, what a State pays its employees has, to this point, been an indispensable sovereign function of State government, upon which the integrity of all its various programs depends.

Application of the Fair Labor Standards Act of 1938 under the 1974 Amendments to *all* State and local employees constitutes and unprecedented interference by Congress with the rights and prerogatives of State and local government over the manner in which the wages, hours, compensable time, and other personnel matters are established and administered. The net effect is to confer upon Congress and Federal administrative agencies outright control of local employees who occupy purely *governmental* positions—created by local government, paid with funds raised by local government, and performing indispensable services entirely intrastate in character. On its face, the Act constitutes an unwarranted invasion by the Federal Government into sovereign governmental activities which are unique to the States and essential to their preservation as a viable part of our Federal system of government. *See, e.g.,* fn. 25, *infra,* p. 47. Such action cannot be justified by congressional power to regulate commerce, and is facially suspect in view of the Tenth Amendment to the United States Constitution, which provides as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This case, not unlike *Fry* v. *United States,* No. 73-822 [14] (submitted for decision November 1974),

[14] The State of California has filed a Brief as Amicus Curiae in Support of Petitioners in that case.

presents for this Court the crucial question of whether Congress, given what it deems to be sound action for the national economy, may intrude into the substantial internal budgetary activities[15] of a State in the interest of promoting commerce. In *Fry,* the issue is whether the Economic Stabilization Act of 1970, controlling the *ceiling* of State wages and salaries, is constitutional under the Commerce Clause. Here, the other extreme must be resolved—viz., whether the Fair Labor Standards Act, controlling the *minimum* amount of wages and salaries to be paid to State employees may seek and find the same constitutional support.

Appellant State of California respectfully submits that because this case (as well as *Fry*) entails a patent federal attempt to regulate *all* sovereign activity, without the benefit of even a superficial attempt by Congress to isolate that State activity deemed to "affect" commerce, that this Court should invoke a test of strict scrutiny of the statute, akin to that which is used to measure the constitutionality of Federal statutes which involve "suspect classifications" or which touch on "fundamental interests." See and compare *Shapiro* v. *Thompson, supra,* 384 U.S. 618,

[15] The California Department of Finance has estimated that for the ensuing Fiscal Year 1975–1976, the cost for the personal services (including salaries and wages) of state employees is 76 percent of the total State operations budget. The salaries of Federal employees make up at least 25 percent of Federal budget outlays. See *Recent Federal Personnel Cost Trends* (Tax Foundation Inc., Government Finance Brief No. 24; December 1973 [1974]), page 20. Of course, these figures must be tempered by the fact that "executive, administrative, or professional" personnel are exempt from coverage under the Act.

638 (1969); *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963). Normally, the Secretary of Labor has the burden of proof on the issue of whether the activities in question find coverage under the Act. See *Anderson* v. *Mt. Clemens Pottery Company*, 328 U.S. 680, 686–687 (1946). Because the Fair Labor Standards Act Amendments of 1974 are so facially suspect, appellant State of California respectfully submits that the Government should be required to bear the burden of establishing that the federal regulation of virtually all State salaries is supported by a compelling national interest and, if so supported, that such regulation will not unduly interfere with the State's performance of its sovereign functions.

The unprecedented Federal intrusion at hand goes to the entire operation of the State governments, and thereby offends not only the Tenth Amendment, but the entire concept of federalism which was a predicate for the establishment of the Constitution. The very structure of that supreme document assumes that States operate as governmental entities sovereign in their sphere. Thus, in *Knapp* v. *Schweitzer*, 357 U.S. 371, 376 (1958), the Court stated:

> "The essence of a constitutionally formulated federalism is the division of political and legal powers between two systems of government constituting a single Nation. The crucial difference between federalisms is in a wide sweep of powers conferred upon the central government with a reservation of specific powers to the constituent

> units as against a particularization of powers granted to the federal government with the vast range of governmental powers left to the constituent units."

This is the reasoning given for numerous decisions on intergovernmental immunities. See, e.g., *Collector* v. *Day,* 78 U.S. (11 Wall.) 113 (1870); *cf. New York* v. *United States,* 326 U.S. 572 (1946). See Black, "Structure and Relationship in Constitutional Law" 7 (1969). Constitutional demands protecting the federal system emanate not only from the Tenth Amendment, but from the relationships created by the entire Constitution. For example, equality of states in the Senate is the only provision of the Constitution which may not be amended (U.S. Const., Art. I, §§ 2, 3, and 4); the State legislatures are given specific functions in the Constitution with respect to electors for president and vice-president (U.S. Const., Art. II, §§ 2 and 3); and the Eleventh Amendment prohibits suits in Federal forums against a State by its own or other citizens. California submits that the rights of a sovereign State, recognized throughout the Constitution like those of the citizens of the United States should, as here, be protected under the Fifth Amendment from the arbitrary abuse of the Commerce Power by Congress. *United States* v. *Carolene Products Company,* 304 U.S. 144, 147–148 (1938).

The power of Congress to tax (Art. I, § 8) has been discussed in the context of requiring that the

exercise of such power not "interfere unduly with the State's performance of its sovereign functions of government." *New York* v. *United States,* 326 U.S. 572, 586–587 (1946) (Stone, C. J., concurring); *McCulloch* v. *Maryland,* 4 Wheat. 316, 431 (1819) ("The power to tax involves the power to destroy.").[16] Stated another way, the distinction to be drawn is between "the State as government and the State as trader." *New York* v. *United States, supra,* at 579. The Federal taxing power may not be used to regulate matters of State concern where the commerce power is inapplicable. See *U.S.* v. *Constantine,* 296 U.S. 287 (1935). The converse should also be true: The Commerce power should not be used to regulate matters of State concern where the taxing power is inapplicable.[17]

Each time Congress is allowed to interfere with sovereign State functions by the device of the Commerce Clause it has advanced one step towards the destruction of the States as an effective political entity.

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[16] Justice Holmes, dissenting in *Panhandle Oil Co.* v. *Mississippi,* 277 U.S. 218, 223 (1928) felt that such power would not be abused ". . . while [the United States Supreme Court] sits."

[17] In *New York* v. *United States, supra,* 326 U.S. 572, 582 (1946), the Court stated:

> "Surely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce. There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a State-house; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State."

Therefore, the need for the preservation of a Federal form of government requires that judicial limitations be placed on this congressional power. This Court has found such limitations on the taxing power to be implied in the Constitution. The same limitations have not been explicitly placed on the Commerce Clause because, to this point, it had been assumed that the application of the commerce power would not be as great as that of the power to tax. In view of the Fair Labor Standards Act Amendments of 1974, that assumption can no longer be relied upon.

The specter of Federal regulation of the wages and hours of the employees of the sovereign State governments not only offends the Tenth Amendment, but is a patent threat to the life and integrity of our Federal system of government and a proposition which the framers of the Constitution would abhor. Such an interpretation of the Commerce Clause would be beyond the understanding of the ratifiers who understood the purposes of the new power to be to halt the erection of trade barriers by the States against each other and not to permit regulation of the States' own government. See *Madison, The Federalist, No. 42*; *Frankfurter, The Commerce Clause under Marshall, Taney and Waite* (Univ. N. Car. Press, 1937), 12–13. It was understood by the States that the commerce power would be used to protect them from destroying each other commercially and not as a weapon to be used by the Federal government *against* the States. In adopting the Constitution the states did so with the understanding that they were to be an integral

part of the new Federal system without fear of Federal encroachment on their authority through use of the new central power. As stated by Hamilton, an advocate of a strong national government: "It may safely be received as an axiom in our political system, that the State Government will, in all possible contingencies, afford complete security against invasions of the public liberty by the National Authority." *Hamilton, The Federalist No. 28.*

Madison, in *The Federalist No. 45,* described the respective powers of the two sovereignties:

> "The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. Powers reserved to the several States will extend to all the objects, which come under the ordinary course of affairs, concerning the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State."

Although there was little opposition to the delegation of the commerce power, the States were still concerned over the degree of control over State government which the national government might have been authorized to exercise under the new Constitution. Several States ratified the Constitution only upon the

condition that certain amendments be added including one which would reaffirm the understanding that the powers not delegated to the national government were reserved to the States, free from national interference. At the first Congress assembled under the Constitution, Madison's committee proposed a series of amendments, the last being the Tenth Amendment.

The Tenth Amendment added nothing specifically to the Constitution; it neither enlarged nor restricted any particular State or national power. *United States* v. *Spragg,* 282 U.S. 716 (1931); *United States* v. *Darby,* 312 U.S. 100, 124 (1941). However, it did confirm the understanding that the Federal government was one of specific powers, that all powers not specified were reserved to the States or the People. It is clear that the States did not intend to create a national government which could, under any of its given powers, unduly interfere with the operation of State government, including use of the Commerce Clause, adopted merely to give the Federal government the power to prevent State tariff barriers. The Tenth Amendment indicates that the framers saw a distinction between the powers necessary to a Federal government and the preservation of State sovereignty in control of its internal affairs.[18]

[18] "There is common area where the necessary power of the federal government coexists with the sovereignty of the state regarding matters occurring within it. Since this common area was not a part of the framers' conceptions, it is impossible to look to the framers' intent to discover how it would be resolved. To the extent that such an overlap was perceived, the working of the Tenth Amendment as a residual clause suggests it was resolved in favor of national power. *However, the framers probably did*

This Court has repeatedly found this to be the framer's clear intent. An exemplary expression of the historical establishment of the respective powers of the national and State governments was set forth ("perhaps at unnecessary length", 298 U.S. at 297) by Justice Sutherland in *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 294–296 (1936):

> "The general rule with regard to the respective powers of the national and the state governments under the Constitution, is not in doubt. The states were before the Constitution; and, consequently, their legislative powers antedated the Constitution. Those who framed and those who adopted that instrument meant to carve from the general mass of legislative powers, then possessed by the states, only such portions as it was thought wise to confer upon the federal government; and in order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated but enumerated —with the result that what was not embraced by the enumeration remained vested in the states without change or impairment. Thus, 'when it was found necessary to establish a national government for national purposes,' this court said in *Munn* v. *Illinois,* 94 U.S. 113, 124, 'a part of the powers of the States and of the people of the States was granted to the United States and the people of the

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not foresee that such a resolution could eventually lead to federal power to control all conduct within a state." (Emphasis added.) Bogen, "The Hunting of the Shark: An Inquiry into the Limits of Congressional Power Under the Commerce Clause", 8 Wake For. L.Rev. 187, 194 (Mar. 1972).

United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people.' While the states are not sovereign in the true sense of that term, but only *quasi*-sovereign, yet in respect of all powers reserved to them they are supreme—'as independent of the general government as that government within its sphere is independent of the States.' *Collector* v. *Day,* 11 Wall. 113, 124. And since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom. It is no longer open to question that the general government, unlike the states, *Hammer* v. *Dagenhart,* 247 U.S. 251, 275, possesses no *inherent* power in respect of the internal affairs of the states; and emphatically not with regard to legislation. The question in respect of the inherent power of that government as to the external affairs of the nation and in the field of international law is a wholly different matter which it is not necessary now to consider. See, however, *Jones* v. *United States,* 137 U. S. 202, 212; *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 659; *Fong Yue Ting* v. *United States,* 149 U.S. 698, 705 *et seq.; Burnet* v. *Brooks,* 288 U.S. 378, 396.

"The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other. As this court said in *Texas* v. *White,* 7 Wall. 700, 725—'the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.' Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified."

Since *Carter,* this Court has spoken often of the merits inherent in maintaining and protecting our federal system of government. See, e.g., *Maryland* v.

Wirtz, 392 U.S. 183, 201 (1968) (Douglas and Stewart, JJ., dissenting); *Pointer* v. *Texas,* 380 U.S. 400, 414 (1965) (Goldberg, J., concurring); *Ker* v. *California,* 374 U.S. 23, 31 (1963) (Clark, J.,); *Johnson* v. *Louisiana,* 406 U.S. 356, 376 (1972) (Powell, J., concurring); see also Note, *State Sovereignty as a Limitation Upon the Federal Commerce Power,* 45 Yale L.J. 1118 (1936).

Mr. Justice Black, speaking for the Court in *Younger* v. *Harris,* 401 U.S. 37, 44–45 (1971) spoke affectionately of "Our Federalism" as follows:

> ". . . the entire country is made up of a Union of separate state governments, and . . . will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in

> ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."

It is hoped that the "ideals and dreams" of continued "Federalism" articulated by Justice Black will not be lost nor bent to the fleeting expediency brought about by statutes promulgated by a "transient majority of Congress" *New York* v. *United States,* 326 U. S. 572, 594 (1946) (Douglas and Black, JJ., dissenting); *Williams* v. *Florida,* 399 U. S. 78, 133 (1970) (Harlan, J., concurring and dissenting); see also *Coan* v. *State of California,* 11 Cal. 3d 286, 520 P. 2d 1003 (1974) (Mosk, J., concurring).

In *Mitchell* v. *Zachry Co.,* 362 U.S. 310 (1960), this Court found that the Fair Labor Standards Act manifests Congress' concern *not* to impinge upon matters of local interest. Congress did not imbue the Act with its full power under the Commerce Clause (at 316 of 362 U.S.):

> "For the Act also manifests the competing concern of Congress to avoid undue displacement of state regulation of activities of a dominantly local character."

The Court also accentuated the need to resort to practical considerations in construing the Act, not "talismanic or abstract tests, embodied in tags or formulas." 362 U.S. at 313.

It is submitted that the "rational basis" test, used by this Court to gauge the constitutionality of the 1966 Amendments to the Act in *Maryland* v. *Wirtz, supra,* 392 U.S. 183, 190 (1968), can have no application to the omnibus, blanket coverage of *all* State employees under the Amendments of 1974. *See, e.g.,* fn. 24, *infra* p. 47. Application of the "rational basis" analysis would be at best superficial inasmuch as Congress has conveniently (but conspicuously) been silent with respect to those identifiable State functions which are deemed to "affect" commerce. A test of "strict scrutiny" is therefore required to test the fabric of such a novel proposition. Appellant State of California submits that such "strict scrutiny" will of necessity require that the Government establish a compelling national interest for the statute and, if so established, that the Court carefully balance said national interests with the need to minimize interference with essential functions of State Government. See and compare *Hodgson* v. *Hyatt Realty and Investment Company, Inc.,* 353 F. Supp. 1363, 1368–1370 (M.D. No.Car. 1973).

C. This Court Should Prevent Congress from Extrapolating Its Decision in *Maryland* v. *Wirtz* to Unjustifiable Extremes and from Attempting to Regulate Essential Sovereign Functions under the Guise of the Commerce Clause. *Wirtz* has No Application to the Omnibus Blanket Amendments of 1974.

The Fair Labor Standards Act Amendments of 1974 are predicated in their entirety on this Court's deci-

sion in *Maryland* v. *Wirtz,* 392 U.S. 183 (1968). Indeed, *Wirtz* was not only a principal justification advanced by Congress in its House Report (H.R. Rep. No. 913, 93d Cong., 2d Sess. (1974) but has been repeatedly cited by the Government in every paper and pleading which gave rise to this appeal.

Neither Congress nor the Government will find little if any solace in *Wirtz* for the novel and revolutionary aims wrought by the Amendments of 1974.[19] Thus, in *Wirtz,* this Court made repeated reference to the importance of judicial review and the need for a significant probe into facts which could conceivably form a "rational basis" for the Federal statute. The Court emphasized the vital nature of judicial review of Congress' exercise of the commerce power even in the face

[19] Prior to their adoption, these and similar Amendments were repeatedly opposed on the grounds that they unduly interfered with the prerogatives of local government. See, e.g., Hearings on H.R. 7130 Before the Subcom. on Labor, House Comm. on Educ. and Labor, 92nd Cong., 1st Sess. pt. 1 at 522 (1971); Hearings on S. 1861 & 2259 Before the Subcom. on Labor, Sen. Comm. on Labor and Pub. Welf., 92nd Cong., 1st Sess. pt. 1 at 29 (1971) (testimony of Secretary of Labor Hodgson); Hearings on H.R. 4757 and H.R. 2831 Before the Subcom. on Labor, House Comm. on Educ. and Labor, 93rd Cong., 1st Sess. at 263 (1973) (testimony of Secretary of Labor Brennan). President Nixon, in vetoing virtually identical amendments in 1973, agreed (119 Cong. Rec. H. 7596; September 6, 1973). Senator Dominick of Colorado expressed it succintly: "As to local employees, how in the name of heaven do we have a right in the Federal Government to determine what wages are to be given to an employee of a local school district? *Where do we get the brains to determine what employees are going to get in sanitation districts or in other institutions or departments in the various States? How are we going to determine what every local jurisdiction is going to pay an employee in every local agency in the 50 States?*" (118 Cong. Rec. S. 11376; July 20, 1972). (Emphasis added.)

of Congressional findings [20] of an effect on commerce (*Ibid.*, p. 190); that Congress has (as here) in some instances left the question of whether commerce is affected to the Courts (*Ibid.*, p. 192); that the Commerce Clause could not be used to destroy State sovereignty (*Ibid.*, p. 196); and that whether the statute was a proper regulation of commerce would have to be decided on a case-by-case basis (*Ibid.*, p. 198).

The learned District Court below, "troubled" by the contentions raised by appellants, found *Wirtz* to be dispositive for the *single reason* "that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments *do make substantial purchases in interstate commerce of equipment and other goods . . .*" (Emphasis added.) (App. 649). A contention of the Government that the State and local governments "compete" with private industry was expressly rejected (App. 650).

For the reasons given below, appellant State of California submits that *none* of the various rationales advanced by the Government for the omnibus blanket Amendments of 1974 will find support in fact, or in the Constitution.

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[20] In *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), the Court noted that " . . . the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court."

1. In *Wirtz*, this Court recognized that Congress may not use a relatively trivial impact on commerce as an excuse for the broad general regulation of State activities as an entire, undivided, amorphous "enterprise". Despite the current efforts of Congress, the State is not an "enterprise".

The majority of this Court in *Wirtz*, responding to the dissent of Justices Douglas and Stewart, allayed the fear of the States that Congress could, or would, proceed to declare the States to be individual "enterprises" affecting commerce within the Fair Labor Standards Act and thereby absorb or imperil the budgeting activities of the sovereigns (at n. 27 of 392 U.S. 183):

> "The dissent suggests that by use of an 'enterprise concept' such as that we have upheld here, Congress could under today's decision declare a whole State an 'enterprise' affecting commerce and take over its budgeting activities. This reflects, we think, a misreading of the Act, of *Wickard* v. *Filburn, supra,* and of our decision. The Act's definition of 'enterprise' reads in part as follows:
> ' "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose . . . but shall not include the related activities performed for such enterprise by an independent contractor. . . .' 29 U.S.C. § 203 (r). We uphold the enterprise concept on the explicit premise that an 'enterprise' is a set of operations whose activities in commerce would all be expected to be affected by the wages and hours of any group

> of employees, which is what Congress obviously intended. So defined, the term is quite cognizant of limitations on the commerce power. *Neither here nor in Wickard has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.* The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." (Emphasis added.)

By the 1974 extension of the Fair Labor Standards Act to virtually *all* State employees, without delimitation as to the type or character of the employee's work (see *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 571–572 (1943)), the fears of Justices Douglas and Stewart, the States, and even the majority of the Court in *Wirtz*, are now a frightening reality.

a. As acknowledged by recent decisions of this Court, whether the State is an "enterprise engaged in commerce or production of goods for commerce" under the 1974 Amendments must be determined as a matter of statutory history and interpretation without reference to an unlimited universe of nebulous connections with commerce.

There can be little question that a mere Act of Congress may not negate those sovereign functions of a State essential to its proper functioning. See *Ashton* v. *Cameron County District*, 298 U.S. 513, 531 (1936).

Congress has amended section 3(s) (29 U.S.C. § 203 (s)) of the Act so as to include "public agency"

(such as "a State", 29 USC § 203(x)) within the definition of an "enterprise". Such a broad inclusion implies that, by definition, the State is engaged in (or affects) interstate commerce to such an extent that *all* State functions, whether "proprietary" or "governmental", are now subject to the fiscal restraints or mandates of Congress.

The State is not an "enterprise". The language of the majority in *Wirtz,* set out *supra* (n. 27, 392 U.S. at 196–197), makes abundantly clear that the "enterprise" concept should be confined to those operations of an entity whose employees' wages and hours significantly affect interstate commerce. However, in contravention of this Court's limiting language, by the 1974 amendments Congress has used "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities" (*Ibid.*). The Statute must therefore fail.

In *Gulf Oil Corp.* v. *Copp Paving Co., Inc.,* ____ U.S. ____, 43 U.S. Law Week 4059 (95 S.Ct. 392) (December 17, 1974), the questions before the Court were whether a California firm engaged in entirely intrastate sales of asphaltic concrete, marketed locally, was a corporation "in commerce" within the meaning of the Robinson-Patman Act (15 U.S.C. § 13) and Clayton Act (15 U.S.C. §§ 14, 18) and further, whether sales by the firm were "in commerce" and "in the course of such commerce" within the meaning of said Acts. Such questions were resolved in the negative. To the Government's argument that the broad

language of these Acts would include "any conduct" with respect to an ingredient of commerce, the Court found (at 4063 of 43 U.S. Law Week):

> "The universe of arguably included activities would be broad and its limits nebulous in the extreme....
>
> "... The justification for an expansive interpretation of the in commerce language, if such an interpretation is viable at all, must rest on a congressional intent that the Acts reach all practices, even those of local character, harmful to the national marketplace. This justification, however, would require courts to look to practical consequences, not to apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets."

The Court therefore held that by the specific statutory language of the Acts, more than activities which merely "affected" commerce was required (see also: *American Radio Association* v. *Mobile Steamship Association*, ____ U.S. ____, 43 U.S. Law Week 4068 (95 S.Ct. 409) (December 17, 1974). The Court rejected efforts of the Government (and of Justice Douglas, dissenting) to apply cases decided under the Fair Labor Standards Act. The Court held that such cases were distinguishable for the reason that they involved *specific* local activities deemed by Congress to suffi-

ciently implicate interstate commerce. Said the Court (at n. 12, 43 U.S. Law Week at 4062):

> "The jurisdictional inquiry under general prohibitions like these Acts and § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required *when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation.* Compare *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 232–233 (1947), with, *e.g.*, *Perez* v. *United States*, 402 U.S. 146 (1971); *Maryland* v. *Wirtz*, 392 U.S. 183 (1968); and *Katzenbach* v. *McClung*, 379 U.S. 294 (1964)." (Emphasis added.)

In view of the Tenth Amendment, it is doubtful that Congress can constitutionally define and control all sovereign functions. However, assuming the existence of such power, at the very least *Wirtz* requires that Congress adequately define "the specific persons and activities" affecting commerce.

Whether the State of California is an "enterprise" must therefore be determined without reference to an unlimited universe of undefined connections with commerce. Moreover, even if such a broad inclusion could be constitutionally founded, the State is an "ultimate consumer" of the goods which it purchases and is therefore exempt from coverage by section 3(i) (29 U.S.C. § 203(i)) of the Act. This in turn is discussed below.

b. Although *Wirtz* would subject the State to the Act by virtue of the mere purchase of goods which have moved in interstate commerce, even the Act itself recognizes that the "ultimate consumers" of such goods are exempt. The State, which merely utilizes all of its goods in the performance of essential public services, and not for profit, is an exempt "ultimate consumer".

In upholding the constitutionality of the 1974 Amendments, the lower District Court felt compelled to apply this Court's decision in *Wirtz* for the reason that "it is uncontested that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods . . . ." (App. 649). However, it is clear that in the absence of a more specific finding by Congress, section 3(i) of the Act (29 U.S.C. § 203(i)) exempts State and local governments from the Act as "ultimate purchasers" of such goods. See generally *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 513 (1949).

This Court may well take judicial notice of the fact that the State and local governments which purchase interstate goods do so for the purpose of providing public services, not for the purpose of making a profit. Thus, for example, it has been found that even the *United States Government* is an "ultimate consumer" of certain radar equipment as to employees contracted to work upon the equipment in vessels which did not move in interstate commerce. (*Divins* v. *Hazeltine Electronics Corp.*, 163 F.2d 100, 104 (2d Cir. 1947));

and that a local independent contractor, in the business of garbage and refuse collection solely intrastate, was an "ultimate consumer" exempt from coverage under the Fair Labor Standards Act as to gasoline, motor oil and lubricants, purchased in interstate commerce, but which were merely used and not resold. (*Brennan* v. *Industrial America Corporation,* 371 F.Supp. 1164 (M.D. Fla. 1974)).

Recent attention has been given by the Federal Circuit Courts of Appeal to the question of whether goods used by "proprietary" enterprises for purely local, intrastate purposes nevertheless involve an implied "resale" of the goods, negating the "ultimate consumer" exemption. In *Brennan* v. *Dillion,* 483 F.2d 1334 (10th Cir. 1973), the Court cited three District Court cases on each side of the issue (*Ibid.,* p. 1336) then adopted the "resale" theory in finding that apartment house owners were passing on the cost of paint, light bulbs, soap, and the like to their tenants in the form of increased rent. However, such a "resale" theory would find difficult application to the performance of sovereign functions of the States.[21]

[21] We note that in *Brennan* v. *Iowa,* 494 F.2d 100 (8th Cir. 1974), the Court of Appeal for the Eighth Circuit has held that nine Iowa hospitals were not the "ultimate consumers" of goods (bedding, linens, towels, hospital clothing, medical supplies, etc.) inasmuch as the types of institutions in question were found by this Court in *Wirtz* to be "enterprises engaged in interstate commerce." (*Ibid.,* p. 104). Appellant State of California understands the case to be on appeal. Nevertheless, it has little relevance to the broader question raised by the 1974 Amendments—namely, may undefined "enterprises" of the State (or the State itself as an entire "enterprise") enjoy the "ultimate consumer" exemption of the statute. *Ibid.,* pp. 105–107 (Gibson, C. J., dissenting).

2. In *Wirtz*, this Court acknowledged that the ability of Congress to interfere with essential State functions is limited to those economic activities that are engaged in by private persons. The State provides essential public services which, as conceded by the lower court, are "not seriously in competition with private industry."

The lower court has found that the employees of state and local institutions covered by the 1974 Amendments "perform governmental functions not seriously in competition with private industry." (App. 650). This finding was reached in light of language of this Court in *Wirtz* which stressed the "competitive" or "proprietary" nature of the activity sought to be covered:

> "If a State is engaging in economic activities that are validly regulated by the Federal Government *when engaged in by private persons,* the State too may be forced to conform its activities to federal regulation." (Emphasis added.) *Maryland* v. *Wirtz, supra,* 392 U.S. at 197.

In *Wirtz,* this Court also stated (at 193–194 of 392 U.S.):

> "Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions *it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals."* (Emphasis added.)

The "competitive" or "proprietary" nature of the State activity in question was emphasized again in

Employees of the Department of Public Health and Welfare v. *Missouri*, 411 U.S. 279 (1973). There, this Court distinguished its prior cases (*Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964)) which upheld under the Commerce Clause Federal regulation of certain State activities operated "for profit" (411 U.S. at 284).[22] The Court refused to place the State in the position of a "proprietary" employer or to cause the State to surrender its Tenth Amendment sovereignty (411 U.S. at 286–287):

> "It is true that, as the Court said in *Parden*, 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S., at 191. But we decline to extend *Parden* to cover every exercise by Congress of its commerce power, *where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear.*" (Emphasis added.)[23]

It similarly follows that the States should not be treated on the same footing as other "employers" for purpose of regulation under the Fair Labor Standards

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[22] State activities have never been totally immune from regulation where such activities were "proprietary", i.e. activities which were or could be performed by private enterprise. See, e.g., *California* v. *Taylor*, 353 U.S. 553 (1957); *California* v. *United States*, 320 U.S. 577 (1944); *United States* v. *California*, 297 U.S. 175 (1936); *Board of Trustees of Univ. of Illinois* v. *United States*, 289 U.S. 48 (1933); *Sanitary District* v. *United States*, 266 U.S. 405 (1925).

[23] That the "proprietary" and "governmental" distinctions of State activities were fostered by the majority opinion in the *Employees* case is demonstrated in the extensive dissent of Justice Brennan (*Ibid.*, p. 303) and concurring opinion of Justice Marshall (*Ibid.*, p. 297, fn. 11).

Act. The activities undertaken by the governments of the several States are principally "governmental", not "proprietary". If the State ceased to perform such services [24] it is unlikely that private enterprise would step in to fill the need.

California's noncompetitive nature is best described by the opinion of Justice Mosk, concurring in *Coan* v. *State of California,* 11 Cal.3d 286, 520 P.2d 1003 (1974). Paying an "unyielding respect for the traditional federalism upon which our republic was established", Justice Mosk found that application of the Economic Stabilization Act of 1970 to the sovereign States would transgress the Tenth Amendment. With respect to the claim that the Commerce Clause provided the necessary constitutional support for the Act, Justice Mosk stated (at 1012 of 520 P.2d):

> "If we examine application of this federal act in the light of the commerce clause, we would at once experience the utter futility of trying to detect activity in interstate commerce by a janitor in the

[24] Consider, for example, State activities staffed by prison personnel, highway patrolmen, meat food inspectors, narcotic agents, park rangers, licensing personnel, historian specialists, fire prevention officers, highway equipment mechanics, tax compliance supervisors, water use analysts, airport environmentalists, property appraisers, and regulatory inspectors and examiners, to name a few. The improper application of the Fair Labor Standards Act to patients working in California State Hospitals for the developmentally disabled and mentally ill, and performing work not exclusively of a therapeutic nature, is the subject of a separate action entitled *State of California* v. *Brennan,* United States District Court, E.D. Cal. Civ. No. S74-740. Such hospitals provide *unique* care, are *not* in competition with any private institutions, and therefore perform a *sovereign* function of the State.

State Capitol, a stenographer in the Governor's office, an administrative assistant to a state legislator, a law clerk in this court, or, for that matter, by every state employee who is hired by the state, paid by the state and whose sphere of service is jurisdictionally circumscribed by the borders of the state. Thus, this could be a classic case in which to take a firm constitutional stand for state independence in its governmental function, however anachronistic such action may seem to those who over the years have bent constitutional principles to fleeting expediency."

This is a similar case in which to assert the autonomous authority of the individual States in the performance of their governmental, nonproprietary activities.

3. In *Wirtz*, this Court's deference to the need for labor peace among private and public workers performing the same or similar work can have no application to State employees performing public services which are without equal in private industry. Moreover, the sensitive parameters of the employer-employee relationship between a State government and its employees is one of local, not national prerogative; thus, for example, no sovereign State grants to its employees the right to strike.

A third rationale advanced by the Government to factually support the 1974 Amendments is the desire to promote and to foster labor peace. Such reasoning

was pivotal to this Court's decision in *Wirtz* (See pp. 191, 194 of 392 U.S.) where there was an apparent need to lessen strife among public and private workers performing the same or similar work. However, the potential interruption in commerce among workers performing the same activities cannot, and should not, serve as a basis for the total abrogation of the State's right to deal with its unique public workers, most of whom have no counterparts in private industry.

There is not a single finding by Congress that labor strife in the public sector has affected national commerce or, if so, whether such strife is correlated to either the lack of a minimum wage or to the uniform administration and payment of overtime compensation. Actually, the converse is true:

> "A rather dramatic picture emerges from the foregoing survey of personnel conditions in the public sector. The number of public employees has been increasing steadily over the past few decades. Labor organizations, both union and quasi-union, have experienced more and more success in their recruitment effort, and appear to have negotiated higher wages for their members than those received by unorganized civil servants performing equivalent chores. In fact, in many cities public employees are paid more than their counterparts in private industry. The consequence of all these factors has been that government payroll expenditures, even after adjustments for price level increases, have skyrocketed during the decade of the sixties." *Unions and Government Employment* (Tax Foundation, Inc., 1972) p. 44.

In March 1970, the distinguished Advisory Commission on Intergovernmental Relations[25] issued its report after a year-long study of employer-employee relations in the public sector. Recognizing the increase in strikes or work stoppages among public sector employees, the Commission recommended that State labor relations laws prohibit all public employees from engaging in strikes, and more importantly, that Congress should not (as here) promulgate Federal impositions into the local employer-employee relationship:[26]

> "The Commission recommends that Congress desist from any further mandating of requirements affecting the working conditions of employees of State and local governments or the authority of such jurisdictions to deal freely or to refrain from dealing with their respected personnel." (Footnote omitted.)

The reasons for the Advisory Commission's recommendations should be obvious. The needs of, resources for, and administration over, State personnel are unique to each of the sovereign States. Thus, for example, while most States (like California) statutorily

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[25] The 26-member Advisory Commission was established by an act of Congress in 1959 to maintain continuing review of relations among federal, state, and local governments. Its membership includes governors, mayors, state legislators, county officials, representatives of Congress, the federal executive branch, and the general public.

[26] *Government Employee Relations Report* (looseleaf), Section 51 (Bur. National Affairs Inc., 1974), page 120.

prohibit "strikes" or "work stoppages" altogether[27], other States (unlike California) have effected forms of collective bargaining. Most importantly, the competitive pressures operating in the private sector are completely absent in the public; the funds necessary to implement a bargained increase is subject completely to the will of the State or local governmental body.[28] For these reasons, federal intervention into the wages and hours of state and local workers will lead to a morass of confusion so well described by the lower court herein (App. 650):

> " . . . there is evidence that the impact of the 1974 Amendments, in terms of confusing and complex regulations and an enormous fiscal burden on the states, is so extensive that it may seriously affect the structuring of state and municipal governmental activities by reducing flexibility to adapt to local and special circumstances, as through com-

[27] Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 Mich. L. Rev. 943, 944 (Mar. 1969); Spero and Capozzola, *Urban Community and its Unionized Bureaucracies* (1973), pp. 254–257; *Pickets at City Hall*, Report and Recommendations of the Twentieth Century Fund Task Force on Labor Disputes in Public Employment (1970), p. 34.

[28] In California, for example, appropriation of tax revenues necessary to fund the wages and salaries of California State employees is a legislative power (Cal. Const., Art. IV, § 1), and the authority to appropriate said monies resides with the California State Legislature (Cal. Const., Art. III). Neither the State salary-fixing administrative authority (the California State Personnel Board), the executive branch, nor the judiciary, has the power to compel such legislative appropriation of money. *California State Emp. Association* v. *Flournoy*, 32 Cal.App.3d 219, 234–235; 108 Cal. Rptr. 251 (1973); *California State Emp. Association* v. *State of California*, 32 Cal. App. 3d 103, 109; 108 Cal.Rptr. 60 (1973).

> pensatory time off arrangements, rather than time and half overtime pay, and through other local governmental agreements." (Footnote omitted.)

The Court continued to point out that it was "troubled" by the contention of appellants herein concerning the absence of "any factual predicate showing that there has been in the past any substantial degree of either widespread labor unrest curtailing flow of interstate commerce or substandard wage scales." (App. 651). Respondent has yet to demonstrate the existence of the factual predicate of labor strife upon which it relies.

II. NOTWITHSTANDING SECTION 16(b) (29 U.S.C. § 216(b)) OF THE FAIR LABOR STANDARDS ACT, AS AMENDED, THE SOVEREIGN STATES REMAIN IMMUNE FROM SUIT IN THE UNITED STATES COURTS UNDER ARTICLE III AND THE ELEVENTH AMENDMENT

In *Employees of the Department of Public Health and Welfare of Missouri* v. *Department of Public Health and Welfare of Missouri,* 411 U.S. 279 (1973), this Court addressed itself to a question reserved in *Maryland* v. *Wirtz, supra,* 392 U.S. 183 (1968), namely whether by reason of the 1966 Amendments to the Fair Labor Standards Act, State school and hospital employees could subject their State employers to suit in a Federal forum. It was found that the State continued to enjoy its Eleventh Amendment constitutional immunity from Federal suit by a State citizen, notwithstanding the 1966 Amendments.

The *Employees* case in hand, Congress in 1974 amended section 16(b) of the Fair Labor Standards Act (29 U.S.C. §216(b)) "to make it clear that suits by public employees to recover unpaid wages and liquidated damages under such section may be maintained in a Federal or State court of competent jurisdiction." (H.R. Rep. No. 913, 93rd Cong. 2d Sess. (1974)). However, as will be seen, the amendment to section 16(b) is still constitutionally infirm under both Article III of the Constitution and the Eleventh Amendment.

Eleventh Amendment Immunity

The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In the absence of a State's consent, it can generally be said that the Eleventh Amendment prohibits a State citizen from seeking, or a Federal court from entering, a judgment for monetary relief to be paid from a State's treasury.

In *Edelman* v. *Jordan,* 415 U.S. 651 (1974), this Court articulated in great detail the protection afforded the sovereign States under the Eleventh Amendment as to suits brought by citizens of the same or other States. There, respondent Jordan brought a class action for declaratory and injunctive relief in Federal

court against Illinois officials administering the Federal-State programs of Aid to the Aged, Blind, and Disabled (AABD), which are funded equally by the State and Federal Governments. Jordan contended that the State officials were violating Federal law and denying equal protection of the laws by following State regulations that did not comply with the Federal time limits within which participating states had to process and make grants with respect to AABD applications. The Federal District Court's decision imposed a permanent injunction requiring compliance with the Federal time limits, and also ordered the State officials to release and remit AABD benefits wrongfully withheld to all persons found eligible who had applied therefor between July 1, 1968, the date of the Federal regulations. and April 16, 1971, the date of the Court's preliminary injunction. The Court of Appeals affirmed the lower court's decision, but this Court reversed, holding that the Eleventh Amendment of the Constitution barred that portion of the District Court's decree which had ordered retroactive payment benefits. To the argument that the State of Illinois had "consented" to the bringing of such suit by participating in the Federal AABD program, the Court held (at 673 of 415 U.S.):

> "The Court of Appeals held that as a matter of federal law Illinois had 'constructively consented' to this suit by participating in the federal AABD program and agreeing to administer federal and state funds in compliance with federal law. Con-

structive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 171 (1909). We see no reason to retreat from the Court's statement in *Great Northern Insurance Co.* v. *Read*, 322 U. S., at 54 (footnote omitted):

> '[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'

"The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts."

Justice Marshall, dissenting, found that the State of Illinois had effectively waived its Eleventh Amendment immunity from suit in a Federal forum by agreeing to comply with the conditions imposed by Congress for the receipt of Federal funds. 415 U.S. at 695–696. However, in the instant case, it is unlikely that Justice Marshall would find a surrender of

such sovereignty by the mere continued activity of the State in its sovereign sphere subsequent to promulgation of the Fair Labor Standards Act Amendments of 1974. In fact, the best rebuttal to an alleged "consent" or waiver of immunity in the instant case is set forth by Justice Marshall in his own concurring opinion in the *Employees* case (at 296–297 of 411 U.S.):

> "Here the State was fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the State had the choice of either ceasing operation of these vital public services or 'consenting' to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case. Cf. Marchetti v. United States, 390 U. S. 39, 51–52 (1968). In Parden, Alabama entered the interstate railroad business with at least legal notice of an operator's responsibilities and liability under the FELA to suit in federal court, and it could have chosen not to enter at all if it considered that liability too onerous or offensive. It obviously is a far different thing to say that a State must give up established facilities, services, and programs or else consent to federal suit. Thus, I conclude that the State has not voluntarily consented to the exercise of federal judicial power over it in the context of this case." (Footnote omitted)

As in *Employees,* waiver under the circumstances of this case could only be obviated by the abandonment of crucial public services. Such is "no true choice at all".

Article III Immunity

In the *Employees* case, supra, Justice Marshall in his concurring opinion suggested that the real constitutional impediment to the suit there in issue was *not* the Eleventh Amendment, but Article III of the Constitution, establishing jurisdiction of the Federal courts. See *Hans* v. *Louisiana,* 134 U.S. 1, 12–14 (1890). Said Justice Marshall (at 294 of 411 U.S.):

> "Because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this." (Footnote omitted.)

As indicated earlier, Justice Marshall went on to hold that given its Article III immunity, the State of Missouri in the *Employees* case did not (and effectively could not) waive such immunity. An election *not* to waive such immunity would have required the State to literally abandon indispensible public services. The same result obtains here.

There remains the question of whether the broad power of Congress to regulate Commerce under Article I, Section 8, authorizes Congress to demand that the States subject themselves to suit in a Federal forum in the national interest. The answer must surely be

in the negative. The intent of both Article III and the Eleventh Amendment was to guarantee that the States not be made unwilling defendants in Federal court. See *Employees* v. *Missouri, supra,* 411 U.S. at 292, fn. 7 (Marshall, J., concurring). It is submitted that the Eleventh Amendment, the most recent expression of the framers and ratifiers of the Constitution, must prevail over the current, belated attempt by Congress to expose the States to Federal jurisdiction under the Commerce Clause in suits by private individuals. Such jurisdiction is clearly prohibited.

CONCLUSION

For the reasons given, the judgment of the District Court should be reversed with directions to enter permanent injunctive relief against the Fair Labor Standards Act Amendments of 1974 here in issue.

Respectfully submitted,

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